

Zoning Board of Appeals Decisions Decisions for: 09-11-2014

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DECISION OF FALMOUTH ZONING BOARD OF APPEALS

APPEAL NO: 66-14

APPELLANT: GRAHAM ALLISON and ELIZABETH ALLISON of Belmont, MA

SUBJECT PROPERTY: 32 Cape Codder Road, Falmouth, Massachusetts
Map 36, Section 08, Parcel 012, Lot 001

Deed/Certificate: Book 26632 / Page 140

On August 14, 2014 Attorney Robert E. McLaughlin filed on behalf of Graham and Elizabeth Allison, an Appeal with the Falmouth Town Clerk under MGL Ch 40A, Section(s) 8 and 15 and Section 240-202 of the Code of Falmouth regarding the Building Commissioner's determination that the height of the structure at 32 Cape Codder Road in Falmouth, Massachusetts is not in violation of Section 240-70 of the Code of Falmouth.

A public hearing was opened on September 11, 2014. Notice was duly given as required by Section 11 of Chapter 40A, M.G.L., as well as notices sent to all persons deemed to be affected thereby as they appear on the tax list, and at which hearing, at the Board's discretion, relevant and appropriate testimony was heard.

Board Members sitting: Chairman David Haddad, Vice Chairman Kenneth Foreman, Clerk Kimberly Bielan, Member Matthew McNamara and Member Patricia Johnson

Clerk Bielan read the Notice of Public Hearing into the record.

Chairman Haddad noted that Attorney Robert H. Ament, on behalf of property owner(s) Kathleen M. Campanella and Roger M. Marino, submitted a letter questioning the Appellant's standing, therefore he is modifying the hearing process to hear from both attorneys first on the issue of standing. Each lawyer will be given five (5) minutes; the Board will then ask questions on standing. Only if the Board finds standing will the hearing continue with a presentation from the applicant. As Mr. Ament challenged the applicant's standing, Chairman Haddad asked him to make the first presentation.

Robert H. Ament on behalf of Kathleen M. Campanella and Roger M. Marino, owners of 32 Cape Codder Road stated he believes the Appellant to have no standing as there has been no credible information relative to 'harm' submitted by the Appellant. He said that the appellant in their request for enforcement and in their appeal to this Board did not indicate any basis of claim nor did they submit any professional opinion; the appeal is based on pure speculation. Attorney Ament said the appellant's question of view is not a protected interest. There is no nature of standing from the appellant – how aggrieved; question of view is not a protected interest and this Town's bylaw substantiates case law of Kenner v. Zoning Board of Appeals of Chatham – 'homeowners' speculation could not constitute a basis for standing'. Attorney Ament stated his client submitted credible evidence stamped and signed from an engineer and an architect, plus an opinion from a second engineer regarding the height of the structure in question.

Chairman Haddad allowed Attorney Robert E. McLaughlin five (5) minutes for rebuttal on the question of standing.

Attorney McLaughlin spoke on presumptive standing – appellant is an abutter and believes they have standing. He cited from Kenner v. Zoning Board of Appeals of Chatham quote from Marshlian v. Zoning Board of Appeals of Newburyport - "Whether a party is 'aggrieved' is a matter of degree... and the variety of circumstances which may arise seems to call for the exercise of discretion rather than the imposition of an inflexible rule." He said if they [32 Cape Codder Road] violate dimensional code then they [appellant] have standing. He cited Marhefka & another v. Zoning Board of Appeals of Sutton & others – "...diminished water view as a result of further violation of bylaw.....then such an intrusion can confer standing". He further cited Kenner case. He believes the appellant has standing as a question of the

height of the structure at 32 Cape Codder Road.

Board Questions:

Member McNamara asked the year of the Sutton case and which court made the decision.

Attorney McLaughlin stated 2011 [May 13] by the Appeals Court.

Member McNamara asked the year of the Kenner case.

Attorney McLaughlin stated 2011 [March 11] SJC.

Member McNamara commented that he was surprised at his [Attorney McLaughlin's] comment about being unprepared on the question of standing as in his e-mail to Zoning Administrator on September 9, 2014 he suggested standing.

Attorney McLaughlin stated that the Administrator asked for information on how appellant is aggrieved.

Member McNamara stated that your [Attorney McLaughlin] reasons for appeal were different than your complaint to the Building Commissioner. Did the Building Commissioner give you a reason for denial of violation?

Attorney McLaughlin stated yes – engineering report.

Member McNamara asked Attorney McLaughlin if he provided any evidence that there is a violation of height.

Attorney McLaughlin stated yes but that he cannot prove due to being blocked by the owner for access to property.

Member McNamara commented to Attorney McLaughlin on case law "speculation v. evidence" and stated that you [Attorney McLaughlin] have not submitted evidence.

Attorney McLaughlin spoke on timing of engineer's report.

Member Bielan confirmed Attorney McLaughlin's statements that he was bringing the appeal to try to find out whether or not the building violated the bylaw's height regulations.

Member Foreman questioned if standing is related to dimensional regulations and if abutter would have standing.

Attorney McLaughlin said the Town bylaw says a structure can be no more than 2.5 stories and have a maximum of a 35' height – if the structure [32 Cape Codder Road] is outside of zoning envelope - then we [appellant] have standing.

Board discussed question of standing.

Member McNamara said SJC cases back to 1996 provide 'presumptive standing' for the plaintiff. But an appeal cannot be mere speculation – there has to have credible evidence submitted. If the Building Commissioner said it is too tall, you still need credible evidence of harm. He said he feels there is no need to go any further as the burden has not been met by the appellant.

Member Bielan agrees and said that the SJC decision Kenner v. Zoning Board of Appeals – view is not protected and the appellant has not submitted any evidence as to their complaint of height.

Member Foreman said he feels this is a 'catch 22' and thinks they have standing in asking if it conforms.

Member McNamara stated it is not an issue of right – standing is a legal issue. Attorney McLaughlin stated that he can go to court and get discovery – there is nothing to answer Building Commissioner's decision.

Member Bielan said appellant has right to question – Building Commissioner based decision on credible evidence – appellant has no evidence otherwise.

Chairman Haddad agrees with Members McNamara and Bielan.

Member Foreman said he feels appellant has a right and Board should hear the appeal.

Board briefly discussed possible continuation to determine standing by reviewing case law discussed herein.

Member McNamara made a motion to deny standing of the appellant. Member Bielan seconded the motion. Motion did not carry with a 3 – 2 vote – Members Haddad, McNamara and Bielan voted to deny standing and Members Foreman and Johnson opposed motion.

Member Foreman made a motion to grant standing. Member Johnson seconded the motion. Motion did not carry with a 2 – 3 vote. Members Foreman and Johnson voted to grant standing of appellant. Members Haddad, McNamara and Bielan voted in opposition of granting standing.

The Board did not find that the applicant had standing and therefore the Appeal was denied.

Decision of the Falmouth Zoning Board of Appeals Continued:

Appeal Number: 66-14

Appellant: Graham Allison and Elizabeth Allison of Belmont, MA

Subject Property: 32 Cape Codder Road, Falmouth, MA
Map 36, Section 08, Parcel 012, Lot 001

Action: The Board of Appeals, by the signature below, being present, certifies the vote of the Board as follows for the above referenced:

Vote: Board voted 3 – 2 to deny standing of appeal – Motion did not carry.
Second vote by the Board was 2 – 3 to grant the standing for appeal. Motion did not carry. Appeal denied.

David Haddad, Board Chairman

_____ Date Filed With Town Clerk

Notice is hereby given that any appeal from this Decision shall be made pursuant to Section 17 of Massachusetts General Laws, Chapter 40A, and shall be filed within twenty (20) days

after the date of filing of this Decision in the office of the Falmouth Town Clerk.

Notes:

66-14 Allison - 32 Cape Codder Rd., Falmouth / Appeal of BC posted 9/19/14 mm